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IN THE
SUPREME COURT OF THE UNITED STATES

JOHN A. BARRETT, JR. and
SHERYL S. BARRETT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

BRIEF OF CITIZEN POTAWATOMI NATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Citizen Potawatomi Nation ("Citizen Potawatomi") is a federally recognized Indian tribe, with tribal headquarters in Potawatomi County, Oklahoma. 73 Fed. Reg. 18553 (April 4, 2008). Pursuant to policies established and promoted by Congress, Citizen Potawatomi has developed a stable and effective tribal government for approximately 27,000 tribal members.

The Tenth Circuit opinion in this case created a tribal governmental interest in what would otherwise be an individual tax case. Citizen Potawatomi submits this *amicus curiae* brief to set out its tribal governmental interest and support the Petition for Certiorari.

The Tenth Circuit nullified tribal legislative and executive action that Congress had authorized

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[1] No counsel for a party authored this brief, in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

The parties have consented to the filing of this brief.

Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief.

and required pursuant to the Indian Tribal Judgment Funds Use or Distribution Act, 25 U.S.C. §1401 *et seq.,* (the "Distribution Act"). The voided tribal governmental actions applied the tribe's income tax exempt tribal judgment funds to paying a salary to the tribe's chairman, (Petitioner in this case).

This nullification arose when the Tenth Circuit applied the tax canon—a canon of construction which requires that tax statutes state exemptions clearly. The Tenth Circuit used this tax canon despite Congress' express instructions that the Distribution Act was to apply "[n]otwithstanding any other law..." 25 U.S.C. §1401(a). Further, the Tenth Circuit extended this clarity requirement beyond the words of the statute; it applied this clarity standard to the terms of a tribal spending plan which the Distribution Act required in order for Citizen Potawatomi to use its judgment funds for common tribal needs.

As part of the remedial measures in the Distribution Act, Congress clearly exempted from income tax all tribal judgment funds distributed or held pursuant to the terms of an approved plan. 25 U.S.C. §1407. It also authorized and required tribal governmental action to identify the specific uses for those funds pursuant to the approved plan. 25 U.S.C. §§1402, 1403.

The Distribution Act implemented tribal government authority by requiring Citizen Potawatomi and the Secretary of the Interior to submit, for Congress' approval, an agreed plan which

outlined the use of the tribe's judgment funds, (the "1983 Agreement"). (*See* Pet. for Cert., Appendix, at pp. 39-42; 48 Fed. Reg. 40567-01 (Sept. 8, 1983). As Congress had required, this outlined plan limited a per-capita distribution to only part of the judgment funds to tribal members; it planned to set-aside and hold a part of the judgment funds for tribal governmental spending on common tribal needs. 25 U.S.C. §1403. The 1983 Agreement left the identification of specific uses to the annual tribal governmental process in which the business committee proposed line-item budgets, which had to be approved by general vote of the tribe and by the Secretary.

Citizen Potawatomi took the required tribal government action to apply seventy percent (70%) of its judgment funds to per-capita distributions of cash to its tribal members. (*See* Pet. for Cert., Appendix, at pp. 3-4.) There was no issue about the income tax exempt nature of those funds; tribal members receiving those funds paid no income tax on them.

Citizen Potawatomi also took tribal government action to set-aside thirty percent (30%) of its judgment funds to be held pursuant to the 1983 Agreement's plan for tribal spending. Every year since 1983[2] Citizen Potawatomi has taken the required tribal governmental action to identify specific applications of the set-aside thirty percent (30%) of its judgment funds.

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[2] Citizen Potawatomi has also taken tribal governmental action to extend application of the principles of the 1983 Agreement to current. (*See* Pet. for Cert., Appendix, at pp. 5-6.)

In 2001, the tribal governmental action applied part of the tribe's set-aside judgment funds to Petitioner's tribal chairman's salary. (See Pet. for Cert., Appendix, at pp. 7-8.) Petitioner did not include these income tax exempted judgment funds in his gross income. Petitioner is subject to income tax statutes of general application. Income tax statutes of general application are construed with the tax canon – a canon that requires exemptions to be stated clearly.

Even though the Distribution Act is Indian specific, remedial legislation, the Tenth Circuit applied the tax canon. More significantly, it stepped beyond applying the tax canon's clarity standard to the statutory wording of the Distribution Act, itself; it expanded application of this clarity standard to the plan that was outlined in the 1983 Agreement.

By applying the tax canon to the 1983 Agreement, the Tenth Circuit concluded that the plan it outlined did not encompass paying the tribal chairman; but if the outlined plan might be understood to encompass paying the tribal chairman, then it lacked the specificity required for Petitioner to claim a tax exemption. The opinion concluded that Congress' power to set and implement Indian policy "...does not trump the long-standing requirement that an exemption from payment of taxes must be explicitly stated." (*See* Pet. for Cert., Appendix, at pp. 11-13.) Citizen Potawatomi has no financial responsibility for Petitioner's resulting tax and penalty. Petitioner is responsible for paying both.

This extended application of the tax canon voided congressionally authorized and required tribal governmental action which identified the use of its judgment funds under the 1983 Agreement. This nullification disregarded Congress' specific authorization and requirement that tribes take governmental action to identify the specifics of applying their judgment funds under an approved plan; it disregarded Congress' clear provision of a tax exemption for tribal judgment funds used pursuant to an approved plan; and, by imposing tax, it eroded the tribe's opportunity to benefit from the complete use of all the money it was awarded to remediate the government's violations against the tribe.

Citizen Potawatomi is not subject to income tax. It can make no direct use of an income tax exemption. Citizen Potawatomi's interest is protecting the full value of its judgment funds against the reduction in value that results from taxation—a protection provided by the plain terms of the Distribution Act. Further, Citizen Potawatomi's interest is protecting authorized and required tribal governmental action from infringement.

SUMMARY OF ARGUMENT

Certiorari should be granted to review the Tenth Circuit's broad application of the tax canon to a tax exemption that Congress provided in Indian specific, remedial legislation; and to review the Tenth Circuit's application of that canon after Congress specifically instructed that the

Distribution Act was to apply, notwithstanding any other law.

As to applying the tax canon's clarity requirement to such exemptions, the Ninth Circuit approach differs from the approach the Tenth Circuit used in this decision. *Ramsey v. United States*, 302 F. 3d 1074 (9th Cir. 2002), *cert. denied*, 540 U.S. 812, 124 S. Ct. 54, 157 L. Ed. 2d 25 (2003). Further, this Court recognized earlier, but left unresolved, questions as to the application of the tax canon to Indian tribe related tax exemptions. *See Chickasaw Nation v. United States*, 534 U.S. 84, 122 S. Ct. 528, 151 L. Ed. 2d 474 (2001).

The Tenth Circuit opinion demonstrates that Congress' own effort to protect the Distribution Act from any other law failed to prevent a court from choosing to apply a canon of statutory construction that is unique to tax statutes of general application. Congress specifically provided the Distribution Act was to apply: "[n]otwithstanding any other law..." 25 U.S.C. §1401(a). Despite this protection, the Tenth Circuit applied a canon associated with tax statutes of general application. Congress cannot provide the protection that would result from review by this Court.

The Tenth Circuit decision demonstrates how an overly broad application of the tax canon can impair Congress' exercise of its broad power to set and implement Indian policy, up to the point of frustrating the clear intent stated by Congress in a remedial act, specific to Indian tribes. As a result of

its extended application of the tax canon, the Tenth Circuit's opinion:

1. Narrowed or frustrated intent as set forth by provisions Congress included in the Distribution Act, based solely on a judicial canon of statutory interpretation. The court applied this canon despite Congress' specific instruction that the Distribution Act was to control "[n]otwithstanding any other law..." 25 U.S.C. §1401(a). Canons of construction should not be used to disregard clear expressions of congressional intent. *DeCoteau v. District County Court*, 420 U.S. 455, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975).

2. Nullified tribal governmental legislative and executive action which Congress had both authorized and required under the Distribution Act. It nullified tribal governmental action despite the established principle that courts defer to any special treatment that Congress applies to judgment funds so long as it is rationally tied to meeting Congress' unique obligation to Indians. *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 97 S. Ct. 911, 51 L. Ed. 2d 173 (1977).

3. Supported the results of this broad application of the tax canon by concluding that Congress' power to set and implement policy as to Indian affairs "...does not trump the long-standing requirement that an exemption from payment of taxes must be explicitly stated."

> The Tenth Circuit reached that conclusion despite the established principle that Congress has the power to enact Indian specific, remedial legislation that is not subject to nullification or control by laws of general application. *Morton v. Mancari,* 417 U. S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974).

The Tenth Circuit's extension of the clarity requirement beyond Congress' statutory words differs from the Ninth Circuit's approach. The Ninth Circuit applies a clarity requirement to determine whether Congress provided an express tax exemption in the statute. If the statutory words show Congress intended to provide a tax exemption, then any actual application of that exemption is construed favorably to tribes. *Ramsey v. United States*, 302 F. 3d 1074 (9th Cir. 2002) *cert. denied*, 540 U.S. 812, 124 S. Ct. 54, 157 L. Ed. 2d 25 (2003).

ARGUMENT

Canons of construction are judicial guides for determining Congress' intent; they are not conclusive. Evidence of intent embodied in the statute that Congress wrote can overcome conclusions that might be indicated by the use of a canon of construction. *Chickasaw,* 534 U. S. at 94. If Congress has expressed its intent clearly, then a canon of construction should not be used to disregard that intent. *DeCoteau v. District County Court*, 420 U.S. 455, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975).

Citizen Potawatomi recovered tribal judgment funds under the remedial provisions of the Indian Claims Commission Act, 60 Stat. 1069, 25 U.S.C. §70-70v-3 (1946) (repealed). Even though judgment funds were awarded to tribes, Congress retained exclusive, virtually unlimited control of those funds.

Congress has exclusive power to control the use and distribution of tribal judgment funds. Courts preserve this Constitutional grant of power to Congress by deferring to any special treatment that Congress applies to judgment funds, if that treatment is rationally tied to Congress meeting its unique obligation to Indians. *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 97 S. Ct. 911, 51 L. Ed. 2d 173 (1977).

In 1973, Congress directed that all use or distribution of tribal judgment funds would be controlled pursuant to the Distribution Act. 25 U.S.C. §1401. Congress passed the Distribution Act to fund and implement its policy to promote strong tribal governments and Indian self-governance. To provide funding, Congress limited the distribution of judgment funds to individual tribal members. Each tribe had to set aside at least twenty percent (20%) of its judgment funds for tribal government spending on common tribal needs. 25 U.S.C. §1403(b)(5). To promote tribal self-governance, Congress authorized and required tribal governmental action in determining the use or distribution of a tribe's judgment funds.

Congress plainly stated its intent to exempt all tribal judgment funds from income tax. 25 U.S.C.

§1407. Congress also plainly stated its intent that a tribe take governmental action to identify specifics for both: (1) the distribution of the exempt funds to individual members, and, (2) the distribution of exempt funds to meet common tribal needs. 25 U.S.C. §§1402, 1403.

Congress specifically and plainly stated that all use or distribution of these funds was to be made and controlled pursuant to the Distribution Act, and it was to control "[n]otwithstanding any other law..." 25 U.S.C. §1401(a).

The Distribution Act, taken as a whole, evidences the intent of Congress as to judgment funds, as to tribal governmental action necessary to specify their use, and as to the income tax exempt character of judgment funds. The act establishes that Congress intended for tribal governmental action to identify specifics for the use of the tribe's tax exempted judgment funds for common tribal needs.

To implement the Distribution Act, the Secretary of Interior and Citizen Potawatomi agreed to a general plan for tribal use of its judgment funds. The agreement was submitted to Congress for its review and approval. Congress did not object and thus the agreed plan was deemed approved, (the 1983 Agreement).

The Distribution Act's income tax exemption of the judgment funds was reflected in the terms of the 1983 Agreement. The Distribution Act exempted judgment funds which were "...distributed per

capita or held in trust pursuant to a plan approved under the provisions of this chapter..." 25 U.S.C. §1407. The 1983 Agreement exempted judgment funds which were "...distributed per capita or made available under this plan for programing ..." (See Pet. for Cert., Appendix, at p. 41.)

The 1983 Agreement both contemplated and provided the mechanism for annual tribal governmental action to identify specific applications for the tribe's judgment funds.

Because Petitioner is subject to tax statutes of general application, and because courts construe those with the tax canon, the Tenth Circuit applied the tax canon to the exemption he claimed. Applying the tax canon, itself, implicates issues this Court discussed in *Chickasaw*. But, the Tenth Circuit took the step of extending application of the tax canon beyond the statutory words of the Distribution Act. It applied the tax canon's clarity standards to the general plan outlined in the 1983 Agreement.

The Tenth Circuit concluded the general plan did not encompass paying the tribe's chairman; but if the broadly worded 1983 Agreement might be understood to encompass paying the tribe's chairman, then it lacked the specificity the tax canon required to create a tax exemption.

The Tenth Circuit, in effect, concluded that the tax exemption was not available because the general plan in the 1983 Agreement did not specifically authorize the application of judgment funds to Petitioner's salary expense. Under the

Tenth Circuit's reasoning, the 1983 Agreement could not satisfy the clarity standard by relying on clarification by subsequent tribal governmental action and the tribe's annual budgeting process.

Determining the intent of the Distribution Act by examining the clarity of the 1983 Agreement is inconsistent with the concept Congress was pursuing. The Distribution Act intended for plans such as the 1983 Agreement to generally identify the common tribal needs to meet by applying the judgment funds. The 1983 Agreement is intentionally general because it has to allow the flexibility necessary to make annual budgets that meet the needs of the tribe. Both Congress and the 1983 Agreement contemplated that this intentionally created generality would be clarified through annual tribal governmental action that identified the specific uses for the tribe's judgment funds.

The Tenth Circuit's broad application of the tax canon clarity standard poses a dilemma as to how Congress can implement policy as to Indian affairs if a tax exemption is involved. The Tenth Circuit's decision has established that Congress cannot protect enactments from application of the tax canon. Specifically providing that its legislation will control "[n]otwithstanding any other law..." is not enough. So, to assure realization of the benefits of a tax exemption, Congress would be forced to legislate in detailed specificity as to the exact tax exempt applications, tribe by tribe, year by year. Such legislation would undercut Congress' stated policy to promote tribal self-governance; self-

governance would be replaced with constant, detailed, tribal specific enactments that itemize each expenditure of tribal judgment funds.

The Ninth Circuit approach to tribe specific tax exemptions demonstrates how to apply fundamental principles requiring clarity in stating exemptions, and not inferring exemptions, while still preserving Congress' ability to exercise its power to set and implement Indian policy. In *Ramsey v. United States*, 302 F. 3d 1074 (9th Cir. 2002), *cert. denied*, 540 U.S. 812, 124 S. Ct. 54, 157 L. Ed. 2d 25 (2003), the Ninth Circuit applied a clarity requirement to determine whether Congress provided an express tax exemption. If the statutory words show that Congress intended to provide a tax exemption, then issues as to the actual application of that exemption are addressed to assure Congress' intent to act favorably toward tribes.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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